STATE OF MICHIGAN

COURT OF APPEALS

WINDSOR CHARTER TOWNSHIP, a Michigan municipal corporation, Plaintiff-Appellee, v RICHARD W. REMSING, Defendant-Appellant.	UNPUBLISHED October 28, 2004 No. 249688 Eaton Circuit Court LC No. 02-001669-CZ

Before: Murray, P.J., and Markey and O'Connell, JJ.

MURRAY, P.J. (*concurring in part, dissenting in part*).

I concur in the majority's reasoning and resolution of the issues surrounding the signage at defendant's home. However, instead of affirming the trial court on the occupancy issue under Ordinance § 6.2.3, I would vacate that portion of the lower court's order and remand for further proceedings.

As recognized by the trial court and the majority, § 6.2.3(1) of plaintiff's ordinance specifically allows for the operation of a home real estate sales office. However, § 6.2.3(3) further provides that the operation of home real estate (and other) sales offices can take place only so long as "no *employees* other than the occupant of the dwelling are engaged in such activities." (Emphasis added.) The trial court concluded, as does the majority, that it makes no difference whether the individual working with defendant is legally an employee of defendant, or an independent contractor, because it is undisputed that in order to work in the home, a person must be an occupant of the home. That of course is true if the individual working at the home is an "employee," for the ordinance plainly says so. However, left unanswered is the pivotal question presented, i.e., what if the person is an "independent contractor?" Presumably the ordinance means what it plainly says, in that it only applies to "employees" and not "independent contractors," and it would therefore make no difference that an independent contractor was not an occupant of the house.

There can be no doubt that there is a legally recognized distinction between an employee and independent contractor. See, e.g., *Roostertail, Inc v Patti Page, Pattack, Inc*, 32 Mich App 94, 102; 188 NW2d 224 (1971). Moreover, the parties and amicus curiae have cited case law setting forth the common law test for determining whether a real estate salesperson is an independent contractor, or employee, of a real estate agent. See *Louis A Demute, Inc v Michigan*

Employment Security Comm, 339 Mich 713, 721-722; 64 NW2d 545 (1954). Yet neither this Court nor the trial court has seen fit to apply these cases, despite the ordinance applying only to "employees."

Although the result reached by the majority is in all likelihood consistent with the intent of the township in enacting the ordinance, it is not consistent with the plain language of the ordinance. We are required to interpret ordinances as we interpret statutes, *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 498; 597 NW2d 858 (1999), and we must therefore enforce the plain, unambiguous language contained in § 6.2.3(3). *Mayor of Lansing v PSC*, 470 Mich 154, 157; 680 NW2d 840 (2004). If the language used is plain and unambiguous, our inquiry is at an end, and we enforce the language utilized. *Id.* Moreover, it is at least an open question whether a court can refuse to enforce plain and unambiguous language because we in the judiciary feel that the result reached is absurd. *People v McIntire*, 461 Mich 147, 156 n 2; 599 NW2d 102 (1999); *McGhee v Helsel*, 262 Mich App 221, 226; 686 NW2d 6 (2004).

Because there is a distinction between an independent contractor and employee, and the ordinance specifically applies to "employees," if the individual within defendant's employment is an independent contractor, the ordinance would not apply.[1] However, as noted, the trial court did not address this issue because in its view allowing non-occupant independent contractors to work in homes would lead to the "absurd result" of "obliterat[ing] any distinction between the residential and commercial or professional office zoning districts." We should not refuse to apply clear language on the basis that to do so results in absurd or unintended consequences, *McGhee, supra*, especially in this case where there could be a reasonable explanation for the specific use of "employees."[2]

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[1] The concurring opinion believes that to recognize the legal distinction between an independent contractor and employee results in a "hypertechnical construction," which is not proper for this case but may be in other "legal circles." However, our duty in each case is to apply the plain language contained in the ordinance, and my approach is consistent with this canon of statutory (ordinance) construction, as it simply enforces the specific term utilized by the township, i.e., "employees." The approach of the concurrence would have more appeal if the ordinance stated "employ," rather than "employees."

[2] However, if enforcement of the specific language utilized by the township does not effectuate what the township actually intended, it is for the township board, not this or any other court, to fix the problem. Indeed, the township could simply amend the ordinance by striking out "employees" and replacing it with "persons," and accomplish the result reached by the trial court and majority.

I would therefore vacate that portion of the trial court's order and remand for a determination of whether defendant had in his employment an employee or independent contractor.[3]

/s/ Christopher M. Murray

[3] I agree with the majority that the legislatively defined terms within state and federal statutes are not to be utilized in discerning the meaning of this ordinance. Rather, the common law definitions should control. The evidence attached to the lower court documents, and in particular the Affidavit of Understanding, strongly suggests that the real estate agent was an independent contractor of defendant. See *DeMute*, *supra* at 722 ("The salesmen associated with plaintiff were not employees within the common-law definition of that term. Under the usual tests involving the right of control . . . the salesmen cannot be classified as common law employees." (citation omitted)). However, remand would be necessary so the trial court could first address the issue.